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EXPERIMENTS IN THE LEGAL CONTROL OF
SEX EXPRESSION

GEOFFREY MAY

It is generally assumed that the two great English speaking
countries have a common outlook on subjects involving the
morality of the individual, what is called the Anglo-Saxon atti-
tude. It is also assumed that any overt breach of the social
mores will find a condemnation in the criminal law. Upon the
basis of these assumptions it is then a surprise to realize a
sharp divergence between the English and American law on
the subject of voluntary sexual expression.

In America adultery is a crime in every state except Louis-
iana and Tennessee. In just three-quarters of the states co-
habitation between unmarried persons is criminal. And in
twenty of these states fornication is a crime; it is an offense
for two unmarried adult persons, acting voluntarily and in
private, to engage in a single act of sexual connection.¹

In England, on the other hand, there is in practice no law
punishing criminally the voluntary, private sexual expression of
adults. To be sure, there is in theory a continuance of the ec-
clesiastical jurisdiction over the laity pro soluto animae, with
the possibility of the penalty of excommunication, to be en-
forced through imprisonment by the secular authorities. But
such jurisdiction has been dormant for a hundred years, prac-
tically dormant for twice that time, and, as Lord Penzance
judicially declared, a recurrence to such punishment of the laity
would not be in harmony with modern ideas or the position
which ecclesiastical authority now occupies in the country.²

The existence of this silence of the English criminal law
should call forth some particular thought in America at just this
time, should call forth some research as to why the attitude
exists. For in America there is now not only the continuing
demand for new substantive laws for the regulation of sexual
conduct,³ but there are being proposed new administrative

¹ American Social Hygiene Ass'n, Social Hygiene Legislation Man-
ual (1921) charts 40 et seq.
² Phillimore v. Machon, 1 P. D. 461, 467 (1876). See similarly, General
Reports of the Ecclesiastical Courts Commission of 1830, p. 32, re-
printed in 1 Ecclesiastical Courts Commission Report of 1883, p. 265
(app. X).
³ In American Social Hygiene Ass'n, op. cit. supra note 1, at 57, are
suggestions for standard forms of laws relating to adultery and fornication.
measures for the enforcement of these moral laws. The proposals relate to the establishment of tribunals having exclusive jurisdiction over these offenses—"Morals Courts." It might be appropriate then to look into some of the experiments that England had made with specialized tribunals dealing with sexual offenders, to study their success or the reasons for their failure.

THE MEDIAEVAL ECCLESIASTICAL COURT

Ecclesiastical Jurisdiction

Throughout almost the whole of English constitutional history there has existed a system of ecclesiastical jurisdiction quite independent of the temporal law. The dual system continues in a mitigated form today; it continued in a very real sense until 1857. Nor was its development a late one. It goes back to the introduction of Christianity into Anglo-Saxon England.

The Christian doctrine of confession and absolution led to the formulation of the early Penitentials. This penitential discipline was enforced in England not only by the spiritual pressure of the Church but also by the temporal power of the Saxon kings. The king's law and the Church's law were mutually supporting systems. Their jurisdiction and administration were confused. And this confusion was especially marked on the subject of sexual morality. From the Church's point of view the subject was intimately connected with the concepts of sin and spiritual well-being. From the temporal side, and especially in a feudal society, the family system, sexual relationships, had social and economic import.

After the Conquest this confusion of lines was gradually untangled, first by the Conqueror's Mandate of 1085, later by the

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4 These three experiments illustrate practically the entire English legal experience with the control of voluntary sex expression. There were, besides these, the Norman feudal regulations of sex in the local manorial courts. There were, also, the partly different ecclesiastical regulation of sex in the Anglo-Saxon period, and the impotent regulation after the Restoration in 1660.

5 For discussion of jurisdictional confusion under the Anglo-Saxons, see MAKOWER, CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND (1895) 391 et seq.; POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (1895) 16 et seq.; STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND (1878) § 87; HALE, PRECEDENTS AND PROCEEDINGS IN CRIMINAL CAUSES—EXTRACTED FROM THE ACT-BOOKS OF ECCLESIASTICAL COURTS IN THE DIOCESE OF LONDON (1847) VII; OAKLEY, ENGLISH PENITENTIAL DISCIPLINE AND ANGLO-SAXON LAW IN THEIR JOINT INFLUENCE (1923) 149 et seq., 166, 199; STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND (1883) 397; PIKE, A HISTORY OF CRIME IN ENGLAND (1876) 52; PALGRAVE, THE RISE AND PROGRESS OF THE ENGLISH COMMONWEALTH (1832) pt. 1, p. 172.
Constitutions of Clarendon and the Magna Carta. The jurisdiction was eventually defined with some clarity at the beginning of the fourteenth century by the statutes of Edward I and Edward II, *Circumspecti Agatis* and *Articuli Clcri*.

By the fourteenth century, then, the Church had annexed to herself the whole province of sexual morality: she punished fornication, adultery, incest, and these offenses were not punished in the king's court.

**Ecclesiastical Law**

Besides being in possession of an exclusive field of jurisdiction the church courts were free also in the system of law which they administered. There was by this time, to be sure, a developed system of canon law quite independent of the temporal law of any nation. But the general rules of the canon law did not specifically govern the moral offenses of the laity in England. There was nothing resembling an ecclesiastical penal code.

In the earlier history of the Church it had been the bishop's duty to make tours of his diocese, to visit the monasteries and parishes, and investigate the conditions not only of the clergy of the district but of the laity as well. He would then hear informally any cases of breach of the spiritual law and enforce the penitential discipline of the Church. The procedure was simple and summary; the penalties were of a penitential character arbitrarily fixed by the judge. As the courts developed, their procedure, we shall see, became to a degree formalized, but within the jurisdictional limits fixed by the statutes the judge's power of censure was not circumscribed by a fixed ecclesiastical code.

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7 13 Edw. I, st. 4 (1285); 9 Edw. II, st. 1 (1316).


9 2 Stephen, *op. cit. supra* note 5, at 404.


11 Thus we find in Hale, *op. cit. supra* note 5, persons cited by ecclesiastical courts for not giving alms to the poor, for folding sheep in church during a great snow, for giving a dog holy bread, for rejoicing at seeing priests in trouble, for suffering a minstrel to play at a wedding, for refusing to sing in church, "*quod in cantando penitus inexpers est*."
The Judge

As the bishop's duties had increased, he had ceased himself to make visitations. Instead, the archdeacon acted as the bishop's agent; it was before him that causes were originally heard. Gradually from this early visitorial power, the archdeacon acquired a derivative jurisdiction to proceed in criminal causes in his own name.2

The archdeacon's judgments were not final. The bishop had his consistory court, generally presided over by the "official," to which appeals lay from the archdeacon.3 But as we shall see, appeals in cases concerning sex morals were rare.

Procedure

The ecclesiastical procedure varied widely from that of the temporal courts. There were three distinct methods of indictment in criminal cases: inquisition, accusation, and denunciation. In inquisition the judge was in fact the accuser, proceeding upon his personal knowledge or upon common fame. The apparitor, a minor official of the court, busied himself in discovering delinquencies and brought them to the notice of the judge, who then cited the parties to appear. This, before the Reformation, was the most common method of proceeding. In the second form, accusation, an accuser came forward who voluntarily undertook the cause. But the accuser might himself become subject to conditions and penalties, which difficulty was obviated by the third form of proceeding, denunciation, whereunder the person giving the information did not need himself to be the accuser.4

All the proceedings in ecclesiastical causes were *ex officio*, and they were in that entirely opposed to the principle obtaining in our common law. Whereas in the temporal criminal courts no man is bound to accuse himself, no matter the hindrance of justice that may ensue, the whole power of the ecclesiastical court was drawn from this very necessity for the accused to incriminate himself. The judge proposed the charge; the accused, unattended by a legal adviser, had upon his oath to admit or deny the accusation. Should he refuse to take this *ex officio* oath and to make answer, he became subject to all the

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12 4 *The Chronicle of Convocation, Being a Record of the Proceedings of the Convocation of Canterbury* (1872); *Lower House, Report of the Committee on Minor Ecclesiastical Courts and Church Discipline* 5. See also Capes, *The English Church in the Fourteenth and Fifteenth Centuries* (1900) 240.


14 Hale, *op. cit. supra* note 5, at lvii et seq.
ultimate punishments of the ecclesiastical power, even to ex-communication, to penalties which were usually more oppressive than the penalty for the offense for which he was being cited.\textsuperscript{15} If the accused confessed the charge, the cause was concluded and sentence passed. But if, instead, he should deny the charge upon oath, he was then obliged to support his oath by the oath of two or more compurgators. It was only upon the joint oath of the compurgators to the credibility of the accused and their disbelief of the charge that he was pronounced innocent and formally restored to his reputation. If he failed in his purgation he was pronounced guilty. It was not the regular procedure to call witnesses.

The compurgators, it is to be noted, were not required to know anything of the specific charge. A guilty defendant could, then, by his own perjury and by the ignorance of his compurgators, escape unpunished. And contrariwise, an accused person, from want of friends or from his general suspicious character, might be condemned as guilty of a specific act which he had in fact not committed.

The proceedings were informal. The accused first heard the charge officially from the judge. The registrar briefly noted the proceedings and answer. Except for the execution of the sentence, the proceedings were probably attended by no publicity.\textsuperscript{16}

Sentence

The sentence for sexual offenses was largely standard. The delinquent was usually enjoined to do a public penance, either in the cathedral, parish church, or market place, barelegged and bareheaded, clad in a white sheet, and to make confession of his or her crime in a prescribed form of words. The penance was augmented or modified according to the quality of the fault and the discretion of the judge.\textsuperscript{17}

This, to be sure, was a far more moderate punishment for adultery than that which is dictated by the Scriptures, and that which was in force in most European countries.\textsuperscript{18} But more

\textsuperscript{15} LYNDWOOD, PROVINCALE, SEU CONSTITUTIONES ANGLAE (Oxford 1679) lib. 2, tit. 6, c. 2 (Canon of Boniface).
\textsuperscript{16} HALE, op. cit. supra note 5, at lix-lxi.
\textsuperscript{17} ANONYMUS, THE LAWS RESPECTING WOMEN (1777) 337; 1 STEPHENS, A PRACTICAL TREATISE OF THE LAWS RELATING TO THE CLERGY (1848) 883; SMITH, A SUMMARY OF THE LAW AND PRACTICE IN THE ECCLESIASTICAL COURTS (7th ed. 1920) 124n.
\textsuperscript{18} "In some places their throats are cut, in some they are burned, in some buried alive. These examples it is good for all women to hear, for though there be no justice thereon in this realm, those who do amiss live in blame and slander." THE BOOK OF THE KNIGHT OF LA TOUR-LANDRY (Wright's revised ed. 1906: Early English Text Society) 168, written 1371-2.
severe penalties might follow. Adultery might be punished also by excommunication.\textsuperscript{19} And so, too, the lesser sex offenses in default of proper satisfaction of the penitential sentence.\textsuperscript{20}

Excommunication was, of course, the ultimate resource of the ecclesiastical courts. It involved not only spiritual, but also severe temporal penalties. If the delinquent did not, within forty days after the denunciation of this sentence, make his peace with the church, the king’s court by writ of \textit{significavit} or some similar injunction ordered the sheriff to imprison him until he satisfied the claims of the Church.\textsuperscript{21} Besides being imprisoned, an excommunicate lost his civil rights and became something not greatly different from an outlaw.\textsuperscript{22}

One of the strangest punishments for incontinence, and yet one which still survives in variant forms in the statutes of many American states,\textsuperscript{23} is the requirement that the guilty persons intermarry. It is, of course, because of the injunction in the Old Testament that marriage was considered the moral solution of incontinence.\textsuperscript{24} It was a frequent custom of the ecclesiastical courts to continue the proceedings in a case of incontinence until a marriage was effected, and thereafter to dismiss it.\textsuperscript{25}

These punishments of penance, excommunication, and, occasionally, marriage, though decidedly a part of the law and practice of the ecclesiastical courts, were in fact not regularly exacted. Instead, the sentences were commonly commuted for money. And therefrom arose, as we shall see, one of the great abuses of ecclesiastical administration.

The nature of the ecclesiastical proceedings and their conse-

\textsuperscript{19} AYLiffe, \textit{Parergon Juris Canonici Anglicani} (1734) 47.
\textsuperscript{20} 3 STUBBS, \textit{op. cit. supra} note 5, § 724.
\textsuperscript{21} FITZHERBERT, \textit{New Natura Brevisum} (9th ed. 1793) 145 et seq.; 3 BL. Comm.*, 102; \textit{Laws Respecting Women, op. cit. supra} note 17, at 338 et seq.
\textsuperscript{22} WHITEHEAD, \textit{Church Law} (3d ed. 1911) 148; 2 \textit{Stephen, op. cit. supra} note 5, at 412.
\textsuperscript{23} MAY, \textit{Marriage Laws and Decisions in the United States} (1929), under outline headings, Sex Offenses and Marriage.
\textsuperscript{24} Exodus, 22 = 16, 17. This injunction was based on the Hebrew custom of wife-purchase: the father had to be compensated for loss of his daughter’s property value.
\textsuperscript{25} See, for example, HALE, \textit{op. cit. supra} note 5, nos. 274, 291. A strange system was inaugurated by Archbishop Winchelsey at the Synod of Winchester in 1308. Upon a third conviction or confession of incontinence the guilty parties were to be required to enter into a written and enforceable contract that they were thenceforth married if they should thereafter engage in carnal commerce; they became presently husband and wife upon the happening of a condition subsequent. 2 \textit{Johnson, op. cit. supra} note 6, at 328 et seq.; \textit{Lyndwood, op. cit. supra} note 15, app. p. 37.
quences in sex cases may perhaps best be explained by actual illustrations, several of which are set out in a note. 20

20 Archdeaconry of Essex, May 17, 1621. Incontinence.

"Springfield contra Johannem Nashe, a butcher.—. . . John Nashe, butcher, who is notoriously defamed for incontinency with sundrye persons. In particular he doth nowe harbor in his howse one Elizabeth Sweetinge . . . and . . . doth keepe as his common strumpet for the space of these two or three months last past; professinge himselfe to have bene so longe married to her: and yet being nowe further examyned he sayeth he is not; . . . also he hath formerly bene presented for other offenses and because this court hath dealt favorably with him, and forgiven him the fees, therefore he doth but laughe and deride at your courte, and swears you shall never get a penny of him, doe what you can . . . (To purge himself, and pay the fees of court.)" Hale, op. cit. supra note 5, no. 772.


"Sancti Botulphi, Byllyngsgate.—John Johnson was cited for living incontinently with Johanna Duke. They appeared and he confessed to the carnal knowledge. The master directed him to have no access or other conversation with her. Also he ordered that between next Easter and Pentacost he was to proceed the procession according to the custom of penitents, in the parish church, with a one-pound candle in his hand, on three Sundays, then was to offer the candle to the principal ilon." Ibid. no. 328. Translated from the Latin, paraphrased, abbreviated.

Archdeaconry of Essex, May 2, 1592.

"... Before the communion be administered, he the said William Peacocke shall publiquely after the minister (in parte of his punishment for his said offence) confess that he hath previouselie offended the majestie of Almighty God, and deserved his wrath and heavie judgment, for his leudef offence, by him wickedlie committed with the aforesaid Alice Stane: for the which he shall confess himselfe hartely sorye; desiringe Allmightie God in mercye to accepte of his penitencye and contrition, and to pardon his said offence and vouchsafe in mercye to receave him into the number of his elect: promisinge that by the helpe of God he will never commit the like offence againe; also he shall desyer all good people, . . . whom he by his evell example hath offended, to pardon and forgive him; and lastlie shall entreate the people all to praie unto Allmightie God for and with him, and shall after the minister saie the Lordes praier, Our Father, etc . . ." Ibid. no. 636.


"... Margaret Orton, accordinge to her appointment hathe done her penance, in the parisse churche . . . and ther was red the firste parte of the homilie againste whoredome and adulterie, the people ther present exorted to refraine from suche wickednes, whereby the (y) might incurre the displeasure of Almighty God for violating his holy lawe: and the penitent for her offenses, etc . . . (Dominus) pronunciavit esse sufficienter punitam etc." Ibid. no. 484.

Though these illustrative cases happen to come from a comparatively late period, the procedure and penances are identical with earlier notations. For a graphic account of the penance of the famous Jane Shore, mistress of King Edward IV, for adultery, in St. Paul's in 1483, where, clad only in a sheet, she carried both a cross and a wax taper through the crowded streets, see Sir T. More, The Life and Reign of K. Edward V and Richard III (1706) 1 Kennett's Complete History of England 496.

The cases cited in this article are taken from Hale, op. cit. supra note 5, because of the comparative availability of the volume. Similar cases are
Appeal

The sentence of the archdeacon was no more final in cases of sex offenses than in other criminal causes. There was the right of appeal to the bishop, and even to the archbishop. The number of appeals from the judgments in causes of sexual immorality was, however, small, surprisingly small, until one considers the reasons.27

The system of purgation, as we have seen, probably did not at best lead to a large proportion of convictions. And, even so, the sort of person who was convicted for his inability to get compurgators would hardly be in a position to bring appeal, which was particularly difficult to make. Under the canon law the general rule was that a party bringing an unjust appeal was to pay not simple but quadruple costs. But the right of appeal was so greatly abused in order to cause delay that the Council of Trent forbade appeals from an interlocutory decree in all causes of correction. As early as the fourteenth century we find the English clergy complaining of the misuse of process of appeal in cases of moral correction. Archbishops had to direct their courts to limit the right of appeal in such cases. Even after the Reformation, Parliament sought to fix a fine of forty shillings upon appeal, with double costs should the appeal be found unjust.28 Inasmuch as the cost of bringing appeal might thus be greater than the usual cost of a commutation of penance for a moral offense, there was no practical reason for appealing from such sentences.

Administrative Failure

Such then was the machinery of the ecclesiastical courts in their relation to breaches of sexual standards. Did the machinery work as an efficient instrument for moral and sexual elevation? Did it tend appreciably to restrain the social tendency toward moral degradation? Before we answer no, we should recall at least in a word to what depths the moral conditions had sunk in matters connected with sex.

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27 In the Petyt Ms., Inner Temple, now being edited by the Selden Society under the title, Select Pleas in Ecclesiastical Courts, there is seemingly but one such appeal to the Court of Arches: fol. 42.

28 2 Gibson, Codex Juris Ecclesiastici Anglicani (2d. ed. 1761) 1035, note C; see also 2 Reichel, A Complete Manual of Canon Law (1896) 326, n. 147.

to be found in the Episcopal registers of the various dioceses. A book of more limited scope than Hale is Cooke, Act Book of the Ecclesiastical Court of Whalley, 1510–1538 (Chetham Society vol. 44, 1901). Scattered ecclesiastical court cases are to be found in H. M. Public Record Office under Exchequer K. R. (Ecclesiastical) and under Chancery Miscellanea (Ecclesiastical and County Placita).
The incontinence of the mediæval period is evidenced not only by the large numbers of direct prosecutions, but even more effectively by the amount of prostitution and illegitimacy. The moral decadence of the clergy is denounced throughout mediæval literature, and the evils resulting from the degenerated code of chivalry, if less known, were even more widespread. It was an enormous and unwieldy problem that the ecclesiastical courts sought to meet and overcome.

The administration broke down in two ways. One was a question of system, one a question of personnel. And, as is natural, a corrupt personnel took advantage of the defects in a weak system.

The practice of commutations of penance for money had grown up normally. Alms for the poor had been accepted as a form of penance. Alms were a substitute for good works, were in themselves good works. But morals tend inevitably to become externalized: the act itself becomes the desired end, rather than the spirit which prompts the act. As early as 747 A.D. the danger of this method of alms-giving penance had been recognized. The Council of Cloves-hoo was only the first of the dozens of ecclesiastical authorities which looked with continually greater condemnation at the growing system of commutations and sought with ever sterner measures to limit and stamp it out. But the middle ages were well used to the practice of money commutations.

"Feudalism assessed its duties; the law, its list of crimes; religion, her grades of sin—all had their price. You could buy off anything, from the bailiff's order to go nutting for your lord, or the disability to advance a villein's son to order, up to the offended majesty of the King, or the very wrath of God Himself."

Besides, it is noticeable that the less civilized is a being, the less is he able to transcend the ridicule of his fellows. The higher animals and the savage man can withstand social scorn.

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29 In some ecclesiastical courts half of the business was concerned with sexual offenders. HALE, op. cit. supra note 5, at liii.
30 Illegitimate birth was not limited to the nobles who bore the title of Bastard. At least nine percent of the villeins of one manor were bastards. PEEKE, YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, YEARS 18 & 19 (Rolls Series 1905), intro. p. xxx. The rapid spread of syphilis at the end of the fifteenth century is particularly revealing of conditions.
31 A detailed account of sexual immorality in the middle ages will appear in the author's forthcoming volume, SOCIAL CONTROL OF SEX EXPRESSION.
32 CUTHERBT'S CANONS AT CLOVES-HOO, art. 26; 1 JOHNSON, op. cit. supra note 6, at 255 et seq.
33 SMITH, CHURCH AND STATE IN THE MIDDLE AGES (1913) 181.
less well than can we. In a similar way it may be unfair for us to judge by our present-day psychological reactions the feelings which the performance of public penance called forth in the medieval mind. True it is that, slight as penance may now seem to us, the ecclesiastical offender in the middle ages would pay handsomely to avoid it.

Under such circumstances it is not surprising that the Church's numerous official enactments could not stem the tide. It is not surprising that the protests of Wycliffe and the Lollards were of no avail. It is not even surprising that petitions to the king and the king's promises of relief should not have appreciably mitigated the evil.

Money payments did not, however, stop with remission of penance on earth. As penance in the next world was supposed to be commuted by penance in this, the system of commutations led easily to the system of indulgences. One could purchase here and now the remission of punishment in the next world. What chance had the ecclesiastical courts of enforcing true spiritual atonement when for sometimes trifling sums the sinner could purchase eternal salvation?

Did then the Church profit financially by these money fines? Yes, but not the Church alone. Vast amounts went to corrupt officials. Bribes and extortions of ecclesiastical officers were so frequent as to be talked of in every sphere of mediæval life: in official documents, in religious tracts, and in poetry. Most of the corruption was blamed on the minor officials, apparitors and summoners, who extorted money for failing to cite the guilty, and even the innocent, into court. But the charges

31 For a note outlining the subject of commutations and its successive limitations, see 2 Gibson, op. cit. supra note 28, at 1045 et seq. For a fourteenth century manuscript statement from a theological dictionary that canons and constitutions as to commutations were violated, see 1 Coulton, Life in the Middle Ages (1928) 191.
33 Rotuli Parlamentorum: II, 313b, 314a (1372); III, 25 (1377); IV, 9a (1413).
34 Trevelyon, England in the Age of Wycliffe (1899) 362.
35 Coulton, Medieval Studies, No. 8, Priests and People Before the Reformation 8 (reprinted from The Contemporary Review, June & July, 1907), quoting from Chancellor Gascoigne's Liber Veritatem, 123.
36 Rotuli Parlamentorum: II, 230b (1350), 304b (1371); III, 43b (1378); IV, 8b (1413).
37 2 Workman, op. cit. supra note 39, at 117; Archbishop Stratford's Extravagants (1342); 2 Johnson, op. supra note 6, at 372.
extended to the archdeacons themselves. Regular payments were even made to higher officials for actual licence to live in sin, the so-called "sin-rent." No personages, it would seem, were so thoroughly, so universally, disliked in mediæval England as the Church authorities charged with the correction of morals.

Even before the end of the thirteenth century—which was before the forms had actually matured—the ecclesiastical procedure in criminal cases was becoming little better than a farce. The contempt of the domestic spy, the apparitor and summoner, the hatred of the ex officio oath under which the most intimate questions of private life were examined, the scorn of a system which no longer correlated with the social developments, all led to its downfall.

Yet it was the very decay of this experiment in the control of moral conditions that loosed the seeds for further experiments. The decay led to a close alliance between the Church and Crown in the form of the High Commission. And it was the reaction against this alliance that led to a strengthening of Puritanism. Puritanism, instead of struggling with the evils which it attacked, in turn availed itself of the same weapons and yielded to a like reaction.

THE HIGH COMMISSION

Organization and Powers

Elizabeth, upon her accession to the throne, saw two parties arrayed against each other. She saw supporters of Henry VIII and Edward VI seeking to strengthen the crown at the expense of the ecclesiastical authority. She saw the supporters of Mary, who had restored the broken ecclesiastical discipline. And she sought compromise.

The first important step in Elizabeth's reign was the act under which the Court of High Commission was established.

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42 Rotuli Parliamentorum, II, 313b, 314a (1372).
43 For a summary of the subject see Trevelyan, op. cit. supra note 37, at 113-117.
44 1 Pollock & Maitland, op. cit. supra note 5, at 426.
45 7 Froude, History of England from the Fall of Wolsey to the Death of Elizabeth (1863) 8 et seq.; 2 Stephen, op. cit. supra note 5, at 413. The ecclesiastical jurisdiction was abolished in 1640 by statute. 16 Car. I, c. 11. Though it was revived upon the Restoration, its revival was without its one effective weapon, the ex officio oath.
46 3 Stubbs, op. cit. supra note 5, § 729.
47 Errington, The Clergy Discipline Act (1892) 2 et seq.; 2 Stephen, op. cit. supra note 5, at 413.
48 For a complete discussion of the history and jurisdiction of the High Commission, see Usher, The Rise and Fall of the High Commission
This statute provided that spiritual and ecclesiastical jurisdiction over all offenders be united to the crown, which shall have authority by letters patent to appoint commissioners to exercise all such spiritual and ecclesiastical jurisdiction within the realm,

"... to visite reforme redres order correcte and amend all such Erroures Heresies Scisms Abuses Offences Contempts and Emormitees whatsoever ... to the Pleasure of Almightye God thencrease of Vertue and the Conservacon of the Peace..." 49

The commissions first issued under this act were local and temporary. But after twenty-five years Elizabeth issued a commission creating a permanent Court of High Commission.50 This commission gave to the court, among other things, jurisdiction over moral offences.

"And we further empower you, or any three of you, to punish all Incests, Adulteries, Fornications, Outrages, Misbehaviours and Disorders in Marriage; and all grievous Offences punishable by the Ecclesiastical Laws ... to devise all such lawful Ways and Means for the searching out of the Premises, as by you shall be thought necessary. And ... to order and award such punishment by Fine, Imprisonment, Censures of the Church, or by all or any of the said Ways, as to your Wisdom and Discretion shall appear most meet and convenient."

The commissioners were given powers to call suspected persons before them and examine them upon their corporal oath and, if they proved obstinate or disobedient, in not appearing or in not obeying the decrees, to punish them by excommunication or fine or by commitment to ward. They were given power as well to command sheriffs and justices to apprehend offenders, power to demand bond, to make commitments, and in other ways to make their decrees sure of performance.51

Jurisdiction

The establishment of this exclusively powerful commission naturally brought into question the jurisdiction of the ordinary ecclesiastical courts. So generally was their power doubted that the Star Chamber had eventually to order an opinion of the

(1913). For good brief summaries see 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1922) 605-611; 2 STEPHEN, op. cit. supra note 5, at 413-429.

49 1 ELIZ. c. 1, § 18 (1558).
50 December, 1553.
justices to be taken as to whether processes could still issue out of ecclesiastical courts in the names of the bishops or whether letters patent under the Great Seal were necessary. The judges decided in favour of a concurrent jurisdiction.52

Pictured briefly, the High Commission stood to the ordinary ecclesiastical courts in a relation not unlike that in which the King's Court soon after the Conquest came to stand to the local jurisdiction of earlier times.53 It stood to the church courts in much the same relation as the Court of Star Chamber stood to the Courts of Common Law, or the Court of Requests to Chancery.54 Though the two jurisdictions were concurrent, the Court of High Commission had, or, at least, exercised, powers which the inferior courts had never claimed; and it proceeded against offenders who because of their importance might have evaded and even defied the ordinary ecclesiastical courts. It was only the gleanings which were left to the ordinary courts.55

Let us illustrate this concurrent yet superior jurisdiction from the cases touching sex morals.56 We find the High Commission dismissing sex cases which have come before it on three jurisdictional bases. The case may be of too minor importance for it to bother with. Or the offender may already have been before the ordinary ecclesiastical courts for the same offence. Or the offence may be one cognizable in the king's court. Thus the court finding that Robert Sontley, a bachelor, had committed but simple fornication with an unmarried woman, "it was ordered that that article should be put out, as being more fit for an ordinary court."57 Simple incontinence was a matter of "mean consequence."58

Because the commissioners felt that no one ought to suffer

52 See the proclamation made by Charles I on Aug. 18, 1637.
53 2 Stephen, op. cit. supra note 5, at 414.
54 Stubbs, op. cit. supra note 6, at 279.
55 2 Stephen, op. cit. supra note 5, at 414; Stubbs, op. cit. supra note 6, at 279 et seq.
56 The Act Books of the High Commission are found most readily in the Calendar of State Papers, Domestic Series, of the Reign of Charles I. The Act Book of the branch of the court which took cognizance of cases in the Diocese of Durham is published by the Surtees Society, vol. XXXIV: THE ACTS OF THE HIGH COMMISSION COURT WITHIN THE DIOCESE OF DURHAM (1858). Further cases are to be found in GAyDINcE, REPORTS OF CASES IN THE COURTS OF STAR CHAMBER AND HIGH COMMISSION (Caiden Soc. 1886). Manuscript material concerning the Ecclesiastical Commissioners from Elizabeth to Charles I, 1593-1637, is to be found in H. M. Public Record Office (Exchequer K. R., Ecclesiastical Documents, Bundles 12 & 13).
58 S. P. (D. S.) 1640-41, 380: Case of Rice Wynn (July 2, 1640). But aggravated cases of simple incontinence were punished—e.g. Durham, 20: Case of Elizabeth Dixon (Apr. 11, 1629).
twice for the same offence, if the accused had already undergone punishment in the minor ecclesiastical courts for a moral lapse, he was not again punished. And similarly, if the accused had already been punished for his act which constituted a civil as well as an ecclesiastical offence, such as bigamy, the High Commissioner might consider that punishment an adequate cause for dismissal.

Procedure

The procedure in the High Court was similar to the procedure as we have seen it in the ordinary ecclesiastical courts. The accused was haled into court in the same manner. His guilt or innocence were proved by the ex officio oath and by purgation. And, similarly, the defendant might be dismissed for non-appearance of a prosecutor, or want of evidence.

More noticeable, however, in the cases before the High Commission is the degree to which convictions were made solely on the basis of rumor and reputation. Often the fact of carnal connection was not even brought into evidence. In defense of one suspected adulterer it was pleaded,

"You raise great mountaines of expectation, and at last you bring forth ridiculous things, instead of proving an adultery you insist upon a fame. . . . Fame helpeth proofe, but if it has noe ground it is but vox populi vana."  

Almost as if in denial of this condemnation of its methods,

59 Durham, 31: Case of John Comyn (March 8, 1632); S. P. (D. S.) 1640-41, 394: Case of Thomas & Grace Steward (Nov. 6, 1640); ibid. 402: Case of David Roger (Nov. 26, 1640). Where, however, the High Commission had first taken jurisdiction and the accused was later punished by the ordinary court for the same offence, the High Commission did not willingly surrender its jurisdiction. Durham 20: Case of William Rosden (1629-33). And notwithstanding a dismissal because of previous punishment, the accused might be forced to pay large costs to the promoter of the later action against him. Case of Rice Wynn, supra note 58.

60 S. P. (D. S.) 1635-36, 475: Case of Thomas Hesketh (Jan. 28, 1635-6).

61 S. P. (D. S.) 1635-36, 98: Case of Francis Wright (June 11, & Oct. 22, 1635); ibid. 1635-36, 105-107, 115: Case of Stephen Dennisom (Nov. 2 & 14, 1635); ibid. 114, 478, 500, 510: Case of William Frost (Nov. 12, 1635 to May 5, 1636); ibid. 1635-36, 115: Case of Robert Roche (Nov. 2, 1638); ibid. 1639, 181: Case of Paul Clapham (May 16, 1639).


63 Durham, 18: Case of Dudley Swanne (Jan. 29, 1629); ibid. 180: Case of Alexander Veach (June 29, 1637).

64 GARDINER, op. cit. supra note 56, at 246, 250: Case of Dr. Hooko (Nov. 24, 1631).
the court said, a few months later, that boasting about adultery, evidence of which was in itself hearsay, was tantamount to adultery; "that therefore he is to be punished as an adulterer, though it be noe direct proofe of the fact." 65

Along with this procedure in the High Commission there followed abuses just as in the minor ecclesiastical courts. The lesser officials of the court may have been corrupt; at least there were attempts to corrupt them. 66 Penances were commuted in an even more scandalous manner. And the ex officio oath was misused to an extent that led to its ultimate fall, carrying with it the whole structure of effective ecclesiastical discipline. But those abuses we shall discuss as we discuss the greater opportunities for abuse which the High Commission enjoyed.

Punishments

These greater opportunities for oppression lay not in the procedure, then, but in the court's wide assortment of punishments. It will be remembered that the commission creating the court authorized not only ecclesiastical censures but also punishment by fine and imprisonment "or by all or any of the said ways." Thus, sometimes the simple form of ecclesiastical penance was enjoined by the court. The offender was ordered to acknowledge his offence in open congregation, in the parish church, or in the cathedral and in the ordinary manner to walk bareheaded and barefooted before the procession, wearing only a sheet. 67 Occasionally, too, the case for incontinence was dismissed upon proof that the parties had subsequently intermarried. 68

But such simple settlements were almost as rare as they were financially unprofitable. Even in these cases of penance, costs were generally assessed. The penance usually, however, was combined with a pecuniary mulct of a more onerous sort. It is difficult to determine sometimes whether the sum was assessed as a fine to the crown or as a commutation of ecclesiastical penance. The words are used almost interchangeably. But no matter the purpose, the sums exacted were uniformly large. They were inordinately large. 69

65 Ibid. 304: Case of Richard Taylor (June 14, 1632). A fine of £200 other punishment were imposed. See also ibid. 310 et seq.: Case of Richard Hickman (June 21, 1632).


67 Durham, 29: Case of Elizabeth Dixon (Apr. 11, 1629); ibid. 34: Case of Richard Sowerby (Oct. 25, 1632); ibid. 111-113: Case of Margaret Knox (1634). William Robson was ordered to do penance and to remain in jail until he had learned the catechism. Durham, 123 et seq. (1635).


69 Considering a general commodity price index to have been 100 in
The smallest fine for incontinence that the Act Books show was £20 (plus £8 costs), and this was combined with confession and public penance on four occasions. The woman so penalized was a housekeeper. It is difficult to exaggerate the size of the mauls assessed by the High Commission. If a convicted person were not able to pay handsomely—not only in relation to his social and financial condition, but objectively—he would have to endure a combined punishment of penance and imprisonment as well as fine. Thus George Harris, a mere domestic servant, had to perform public penance because his fine was assessed at only £200 plus costs. Amy Green and Reginald Carew were each ordered to pay a fine of £2000; Robert Brandling £3000 and costs. Most of those convicted had to submit also to full penance and to imprisonment. It seems almost strange that Marmaduke Trotter escaped with so light a penalty as £50 fine plus costs, three months in gaol, and four public penances for the incontinence for which he confessed himself "heartily sorie."

Abuses

The basis for assessing the fines was pragmatic. The offender was ordered to pay what the court considered him able to pay. "The court further resolved that defendant's penance should be commuted for a pecuniary fine to be distributed in pious uses, and declared that he being a man of great estate in lands, as well worthy to pay £1,500, but left the business to the further pleasure of the Archbishop of Canterbury." Sometimes, of course, the court overrated the defendant's ability to pay. In such cases it would eventually reduce the fine and take what it could get in settlement. Thus Robert Hawkins's fine was mitigated. And when John Williams's estate decayed, the court thoughtfully reduced his fine of £500 to a paltry £40.

1900, it would have been 48 in 1600, 62 in 1650. Though at the time of the High Commission's sentences the pound sterling had therefore about twice its present value, the size of the fines is obvious without careful comparison of standard.

70 Durham, 44-48: Case of Marie Daniell (1633).
72 S. P. (D. S.) 1634-35, 176; ibid. 1633-34, 481, 536; Durham, 53-68.
73 Durham, 176 et seq. (May 7, 1637). The fines in Durham seem generally to have been lighter, possibly because of the inferior social standing of the offenders in the remote provinces.
74 S. P. (D. S.) 1635, 234: Case of John South (June 23, 1635).
75 S. P. (D. S.) 1640, 399 (Feb. 22, 1640).
Though on first contact such a practical procedure may seem amusing in its very ingenuousness, it proved not too amusing to the offenders themselves. Behind the veiling statement of the mitigation of fine there appeared occasionally a picture of real suffering caused by the exorbitant demands. To take just a sentence each from two cases that ran through the proceedings of the court for years:

"Thomas Cotton and Dorothy Thorneton. Their petition read, praying that they might be released from confinement in the Stafford gaol, where they had remained these four years in great misery." 77

"Sir Alexander Cave... fined £500. In consideration of his long imprisonment and weak estate, his fine mitigated to £50, and he to be enlarged on bond...." 78

The confusion of fines with commutation of penance is interesting because it shows that the idea of penance in its true sense had entirely disappeared. The important thing was the exaction of money, no matter its name. Thus we find John South's sentence of fine of £1,000 and performance of public penance reduced thus: "The fine was this day mitigated at 200 marks, and the amount to be paid by defendant in lieu of performing penance was referred to Archbishop Laud." This notation was underwritten, "Receipt... for £133.6s.8d., being the mitigated amount of the fine above mentioned." 79 A discount of an even 33 1/3 per cent!

The west end of St. Paul's profited handsomely by the industry of the High Commission. To be sure, the large commutations were often allowed to be paid on the instalment plan at the rate of £50 or £100 a year, 80 but the future payments were carefully protected by bonds, the defendant remaining in gaol until the bonds were entered into. 81

The reasons for which these commutations were made again illustrate the non-spiritual considerations of the court. Sir Ralph Ashton, for instance, alleged "that he was a gentleman descended of an ancient family, and had a virtuous lady to his wife, and ten children, and that if he were enforced to perform this penance it would tend to the disparagement of his wife and children, especially divers of the latter standing upon their preferment in marriage." Thereupon the court commuted his penance into a payment of £300. 82

77 S. P. (D. S.) 1639-40, 282 (Nov. 21, 1639).
79 S. P. (D. S.) 1635, 140 (June 23, 1635).
80 S. P. (D. S.) 1635-36, 475, 478, 496, 500: Case of Thomas Hesluth.
81 For one of numerous examples see S. P. (D. S.) 1635-36, 500 et seq.: Case of Sir Ralph Ashton.
82 Ibid.
And finally we may notice an entry that would have caused a
tremor in the heart of the least scrupulous archdeacon:

"Sir John Lamb as referee in this cause, having investigated
the pretended crimes of adultery and drunkenness alleged
against defendant, with the sanction of Archbishop Laud put an
end to this cause. It was therefore ordered by Sir John, that
inasmuch as Mr. Curtys had given a satisfactory sum of money
towards the re-edifying of St. Paul's Church, London, that this
cause should be dismissed... upon payment of the notary's
fees." 83

Here we see the ultimate misuse of the system of commutation. There was no penance assessed which could be commuted. There was no conviction upon which to base a penance. There was even no trial. It was in fact the purchase of freedom, a buying off of court action. It was to such bargain and sale of liberty of the body that the system had descended which had set itself out as a spiritual purification for a spiritual offense, as a liberation of the penitent soul.

Inefficiency

Striking as may be these abuses and striking the oppression re-
sulting from them, it is not because of abuses that we must
condemn the High Commission. It is because of inefficiency. It was inefficiency that caused more oppression than did all the wilful abuses. It was inefficiency that brought ecclesiastical administra-
tion generally into contempt. It was inefficiency that led to failure and a justification of the Puritan demand for
reform. The ineffectiveness expressed itself in various forms, notably in delay, in expense, in impotency, in triviality.

The case of Sir William Hellwys for adultery is not an un-
usual example of delays. After unprinted proceedings in pre-
vious years, we first hear of Sir William's activities in April
1634. We hear two years later that they still continue. In
the meantime the High Commission has taken some action
against him upon twenty-two distinct occasions.84

In the course of fifteen hearings against Mark Corbold and
Susannah Copping for suspicion of adultery, the defendants
were admonished not to be found privately in each other's com-
pany. Three years later the proceedings began afresh and were
only dismissed upon paying the promoter £160 costs, "the court

84 S. P. (D. S.) 1633–34, 580, 582; ibid. 1634–35, 51, 110, 113, 116, 119,
123, 262, 268, 272, 276, 335, 492, 499, 522, 533, 542, 546, 551, 553; ibid. 1635,
180, 188, 230; ibid. 1635–36, 225.
seeming well contented therewith... if the composition be performed to the liking of the promoter." 

Not only was the court itself dilatory; its officers were either indolent or corrupt. Ralph Hutchinson was not apprehended for his adultery because the messenger "could not gett into that part of the country by reason of the snows." John Rutherford was not attached for his adultery because the messenger's horse was stolen. Later he was reported dead. George Hume, Margaret Mitton, John Brackenbury, and Elizabeth Lighton, adulterers all, escaped from the country. Though both William Armestronge and Thomas Armestronge were apprehended by error and charged with adultery, Richard Armestronge, the accused, remained at large. To be sure, Richard Ourd was attached on the accusation of adultery, but he was rescued in a violent manner by friends, and Robert Brandling, though once committed for adultery, escaped from gaol.

Absurdities were frequent. Proceedings were allowed to continue against a defendant for adultery though his alleged paramour had already purged herself of the offense. Having been acquitted of the charge of adultery after eighteen court notations, Sir John Astley, over seventy years of age, was admonished that he must never permit a woman to lodge in his bedchamber as had formerly been ordered by his wife when he was ill with the gout, even though there were a proper chaperon constantly present.

In conclusion we might make brief mention of the case of Thomas Hall, charged with adultery. The whole gamut of High Commission resourcefulness was run in order to effect the defendant's proper appearance: attachments, commitments, bonds, attempts by the messenger and by the sheriff at further attachments, intimations, forfeits, contempt proceedings. The case was pending for four years. The machinery of the court itself was put into motion nineteen separate times, that of its officers numerous intervening times. The result was that the defendant was adjudged innocent.

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86 Durham, 123 (Mar. 9, 1636).
87 Durham, 124 (June 21, 1635).
88 Durham, 74 et seq., 167.
89 Durham, 139.
90 Durham, 140 et seq.
91 Durham, 53–68.
92 Durham, 135–139: Case of William Ridley & Anne Morrale.
93 S. P. (D. S.) 1635, 228 et seq.
94 Nevertheless he was charged with costs, for non-payment of which proceedings were renewed. Durham, 129 et seq.
Appeals

No matter their abuse and oppression, no matter their delay or absurdity, there lay no appeal from the decisions of the High Commission. By statute appeal might be permitted from the courts of the archbishops to the king's commissioners. But the High Commission itself acted as the king's delegates. There could be no remedy against their sentences other than the appointment of a new commission by virtue of the royal prerogative.

The Commission's Fall

The one comparatively effectual weapon of the High Commission in its ill-directed activities was the ex officio oath. And it was of this that the court's opponents sought most strenuously to deprive it. Burleigh remonstrated that this procedure savoured of the Romish inquisition, and the only reply that Whitgift could muster was that, if the court were to proceed by witnesses and presentment, the evidence would be insufficient for conviction. Upon motion made by the Commons in Parliament, the Lords of Council in 1607 demanded of Coke and Popham, C. J., in what cases the ex officio oath might be used. They replied in part that the oath was not to be administered in accusations of adultery and incontinence. In many cases the courts of common law opposed themselves to the powers that the High Commission assumed in forcing accused persons to incriminate themselves. In fact Coke debated the Archbishop of Canterbury before all the justices of England and many high ecclesiastics on the authority of the High Commission.

No alteration was made in the constitution of the High Commission, however, in consequence of these proceedings. Parliament petitioned against it in 1610, to no avail. To all observation its power increased, and was at its height between Charles I's third Parliament in 1628 and the meeting of the Long Parliament in 1640.

But these were mere surface rumblings of a far greater storm. By the time of Charles I, Clarendon says that the High Commission had scarce a friend left in the kingdom. It had antagonized and welded together a strange opposition: the precise and the loose-liver. And too, as the Puritans saw the power, which they thought should be exercised by their own ministers,

96 2 Gibson, op. cit. supra note 28, at 1037, note gg.
97 Stephen, op. cit. supra note 5, at 415 et seq.
99 For example, 12 Coke Rep. 19 (1826 ed. VI, 217).
100 12 Coke Rep. 34 (1826 ed. VI, 311).
exercised through a royal commission, so also did the bishops see their position as bishops ignored. But whereas the churchmen and the moral reprobates held their peace and endured their ignominy, the Puritans suffered and waited their turn to persecute.\textsuperscript{102}

The storm broke in 1640. Reciting “the great and insufferable wrong and oppression of the King’s Subjects” caused by the High Commission, the statute 16 Charles I, c. 11, repealed the statute of Elizabeth insofar as it allowed the appointment of commissioners to exercise ecclesiastical jurisdiction. It took away from the ordinary ecclesiastical courts, too, all their criminal jurisdiction. And lastly it rooted out for ever from English law the hated \textit{ex officio} oath.\textsuperscript{103}

The abolition of the High Court was but an initial thunderclap. The intensity of the storm we shall be able better to measure when we observe what the Puritans themselves sought to erect on the ruins of the structure which they had destroyed.

\section*{CIVIL CONTROL DURING THE INTERREGNUM}

The preamble of the Puritan act “for the suppression of the abominable and crying sins of incest, adultery, and fornication, wherewith this land is much defiled, and Almighty God highly displeased” was not altogether rhetorical. For some time the popularity and prevalence of vice had been growing. The court of James I had been notoriously corrupt in morals, and the country houses of many great lords, the pattern to the gentry of whole districts, were little better. Coarseness of language was as yet unrestrained by propriety; drunkenness was the acknowledged fault of the nation.\textsuperscript{104}

Long before the development of Puritanism there had been attempts to express in the civil law a condemnation of sexual laxity. As early as the reign of Henry VIII a bill was introduced in the House of Lords concerning “women lawfully proved of adultery”\textsuperscript{105} and another concerning incontinence.\textsuperscript{106} Bills on the same subjects were considered in Parliament during

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{102} Trevelyan, \textit{England under the Stuarts} (12th ed. 1925) 174 et seq.; Stubbs, \textit{op. cit. supra} note 6, at 280 et seq.
\item \textsuperscript{103} The statute 13 CAR. II, c. 12 (1661), which re-established the jurisdiction of the ordinary ecclesiastical courts, did not revive the power to utilize the \textit{ex officio} oath. \textit{Ibid.} \S 4.
\item \textsuperscript{104} Trevelyan, \textit{op. cit. supra} note 102, at 64. See also 4 \textit{Tail\&Mann, Social England} (1903) 214 et seq.
\item \textsuperscript{105} Journals of the House of Lords, I, 215b (March 9, 1542-3).
\item \textsuperscript{106} \textit{Ibid.} I, 224a (\textit{Apr. 9, 1543}): see also \textit{ibid.} I, 221a (Apr. 9, 1543).
\end{enumerate}
\end{footnotesize}
nearly every succeeding reign. During the reign of Charles I these attempts at legislative enactment became numerous.

But it was not until the breach with the king and the establishment of the power of the Long Parliament that attempts at the legislative repression of sex through the criminal law became determined. After six years spent in consideration of various bills, Parliament finally passed the famous act of May 10, 1650. It made adultery a felony punishable by death. It made fornication a crime punishable by imprisonment for three months and until bond were given that such convicted person be of good behavior for the ensuing year. Jurisdiction over the offences was given to the justices of assize on circuit and to justices of the peace at their general sessions.

No one has made any extensive research into the working of this law. The only method of criticism therefore is a study of the cases as they are preserved. Such a method presents pronounced difficulty because the number of cases, and consequently the effectiveness of enforcement, is not to be ascertained. Pike says that the law was "rigorously executed," but in support of his statement adduces no considerable evidence. We can at best judge the success from the cases that we have and correlate these facts with the historical consequences as we know them.

The late Mr. Inderwick, for instance, searched all the manu-


109 Ibid. III, 721, 724; IV, 35; V, 184, 189, 478, 523; VI, 171, 359, 366, 385, 396 et seq., 404, 408, 410, 413. See also 19 THE PARLIAMENTARY OR CONSTITUTIONAL HISTORY OF ENGLAND (1757) 259 et seq.


111 Seemingly the only printed records in which there appear cases of adultery and fornication are the following: 3 Jeaffreson, Middlesex County Records (Middlesex Co. Recs. Soc. 1888); 5 & 6 The North Riding Record Society (Yorks), Quarter Sessions Records (1887-88); Wake Quarter Sessions Records of the County of Northampton (Northampton Rec. Soc. 1924); Depositions from the Castle of York, relating to offences committed in the Northern Counties in the Seventeenth Century (Surtees Soc. XL, 1861). Records of other counties contain no cases under the act of 1650. There is a vast quantity of manuscript material on the subject to be found in the Sessions Rolls for London and Middlesex, preserved in the Record Office in Guildhall. Inasmuch as the charges could be removed to the Upper Bench, indictments and appeals appear in the Coram Rege Rolls (Upper Bench Judgment Rolls) and are indexed on the Controlment Rolls of the period of the Commonwealth, preserved in H. M. Public Record Office.

112 Pike, op. cit. supra note 5, at 183.
script records of the Western Circuit as they are preserved from 1653 to 1660. He found during that period only three charges of the capital offense of adultery. The results of these he was unable to ascertain. There were, in the same period, twelve cases of the minor charge of incontinence, seven women and five men. One woman was acquitted; in two cases there was no prosecutor; in one case the grand jury found no bill. Four persons were bound over from time to time and then discharged; in three cases there was no record of the result. One woman was convicted.

Even more striking are the records of Middlesex County. Of the thirty-four persons tried for adultery and fornication, only two were found guilty. So glaring did the acquittals become on the part of sympathetic juries that the judges began to inflict in the later cases an indirect sort of punishment. Notwithstanding the verdict of not guilty, the persons so acquitted were ordered by the court to give security for their good behavior in the future. Until they should provide adequate surety they were detained in jail.

The records of the North Riding of Yorkshire seem to portray quite a different picture. By far the greater number of persons presented for incontinence were convicted. Compared with the three accused who were found not guilty, sixteen persons were found guilty and committed. But no matter the number of convictions in cases of fornication, the story is always the same as to presentments for adultery. Not a single case of adultery is to be found among the comparatively numerous convictions in Yorkshire. There were, to be sure, accusations. In seven cases presented for adultery in the North Riding the jills were ignored; in one no indictment was found. In a single case a bond for appearance was ordered but no further notice taken.

And so too in Middlesex. It was in Middlesex that the one known case was tried wherein a person was ordered to be hanged for the crime of adultery. On August 30, 1652, Ursula Powell was found guilty of adultery by a jury at Old Bailey. Beside the Gaol Delivery Registrar's brief note of the case appears in the margin an "S." The "S" means suspendatur. Possibly this sentence was executed, but inasmuch as there is no star upon the record to show execution and no reference to

113 Hants, Dorset, Devon, Somerset, Wilts, and Cornwall.
114 INDERWICK, THE INTERREGNUM (1891) 35 et seq.
115 Jeaffreson, op. cit. supra note 111.
116 Ibid. 285-296.
117 Ibid.
119 Ibid. vol. V, 85, 93, 143, 227.
be found in any London newspaper at the time—an item that would not have been ignored—Inderwick concludes that the capital sentence was never carried into effect.120

Whatever the fate of Ursula Powell, the case left its imprint on the minds of the Middlesex County jurors. She was the last person in the metropolitan district who was convicted of adultery. At subsequent Gaol Delivery sessions twenty-two women were tried for adultery; all were found not guilty. It is to be doubted whether so many women could be arraigned on insufficient evidence of guilt.121

It was not only in the failure of convictions that the act ceased to be effective. It was in the growing failure to present offenders. During its early history the act was enforced with considerable rigor.122 Gradually this rigor declined. Conceivably the decline was caused by the seeming hopelessness of effecting convictions. Probably the dwindling of both convictions and presentments was the normal outcome of an increasingly unsympathetic public opinion. It is true, however, that in all the printed records there appear but three cases concerning incontinence after the year 1657.123 The only other legal mention we find of sexual immorality is the occasional report of village constables, demanded, as we shall see, under Cromwell's proclamation, that there were no persons in their communities suspected of adultery or fornication.124

Of this rapid decline in the effectiveness of the control of morals Cromwell was acutely conscious. In three ways he sought to make material the Puritan dream of the establishment of a moral order. First, on August 9, 1655, he issued a proclamation commanding the due and speedy execution of the laws against the abominable sins of adultery, fornication, and other acts of uncleanliness.125 He accused the officers and justices of want of zeal and care in administration; he directed more vigorous enforcement; he ordered justices of assize to take special note of these cases and make report thereof to him.

A mere proclamation could, of course, accomplish nothing of import. The Protector himself could not assume personal supervision of administration. But there were the Major-generals. Unpopular as these officers were during their short-lived

120 Jeaffreson, op. cit. supra note 111, XXII et seq., 287; Inderwick, op. cit. supra note 114, at 37 et seq.
121 Jeaffreson, op. cit. supra note 111.
122 For example, depositions from the Castle of York, op. cit. supra note 111, at 36 et seq.
123 6 North Riding Record Society, op. cit. supra note 111, at 19; Jeaffreson, op. cit. supra note 111, at 270, 296.
124 Wake, op. cit. supra note 111, at 125 et seq., 172 et seq., 223 et seq., 232, 234.
125 Preserved in the British Museum, index no. 669 f, 20 (11).
careers, they provided a central control, responsible to the Protector himself. They were not a part of the local system, not to be swayed by local and personal feelings. To them was given, but a few days after the proclamation, concurrent jurisdiction with justices "to promote godliness and discourage profanity." Moreover they were to act in a way as spies on the administration of these laws, "to certify justices who are remiss, that they may be dismissed."

But public opinion could not accept the Major-generals. Cromwell argued with his second parliament that their erection was "justifiable to necessity, and honest in every respect." He urged Parliament itself to take a hand in the suppression of debauchery and immorality. "Make it a shame to see men bold in sin and in profaneness, and God will bless you." Not only manners needed reform, he said, but laws, especially the criminal laws.

Cromwell's speech availed little. The power of the Major-generals was withdrawn in 1656-7. The only fruit of his plea was the appointment of a committee in October 1656 to consolidate and revise the acts as to moral offences with such alteration as might be necessary. Nothing came of the committee.

At the time when the act of 1650 was passed, Mr. Henry Martin declared in Parliament that the severity of punishment would lead to greater caution in the committing of these crimes of immorality, and the caution make detection less frequent, the offenders more scornful in consequence, and the offences more widespread. Whether it was this secrecy caused by too great severity of punishment, or whether it was the laxity of administration; whether it was the unsettlement caused by war, or whether it was the general weakening of all authority, certain it is that during the period of the Commonwealth there was a distinct deterioration in manners and morals. The principal results of the laws concerning immorality was the increase of espionage on the part of neighbours, the records showing their depositions in language of exceeding coarseness. The records show, besides, that orders for bastardy were very numerous, assaults on women frequent. Drunkenness and immorality seem to have been looked upon as a pleasant method of showing con-

127 2 Carlyle, The Letters and Speeches of Oliver Cromwell (London ed. 1904) 505-557. See also 1 Firth, The Last Years of the Protectorate (1909) 7, 9.
128 Indeurch, op. cit. supra note 114, at 38.
129 3 White, Memorials of the English Affairs from the Beginning of the Reign of Charles I to the Happy Restoration of King Charles II (new ed. 1850) 190.
tempt and defiance of authority, civil and ecclesiastical.130 The spirit that this legal repression engendered became obvious at the time of the Restoration. The Spectator portrayed a not impossible situation when it mentioned the petition of a supporter of Charles who desired the honor of knighthood for having cuckolded a notorious roundhead.131

The act for the suppressing of the detestable sins of incest, adultery, and fornication fell, of course, with the fall of the Commonwealth232 And even as the corpse of Cromwell was dug up and displayed as an object of hatred, so upon the Restoration was the spirit of this act held up for ridicule.

CONCLUSION

The consideration of these experiments has been meant to prove no thesis, to draw no analogy between England and the United States. It may suggest the difficulties inherent in the external control of acts so private as voluntary sex expression. It may suggest the broader question, whether the state can ever regulate successfully the private acts of individuals in whose action there is no conflict of interest.

More directly, however, the English experiments show that the problem of control of sex expression, if a legal problem at all, is dependent not upon the breadth or inclusiveness of substantive law but upon administration. The administrative divergences in American cities are so marked as to make the problem even more clear. In the Boston Municipal Court in 1920, 321 persons were arraigned for fornication, 205 for lewd and lascivious cohabitation, and 70 for adultery.133 In Washington and Cincinnati in 1916, over 1000 cases were presented for fornication, and 131 for adultery. In New York, on the other hand, there is no law against fornication, and in New York City in 1916 there were reported but 10 cases of adultery.134

It is because of this variation in administration, and because of the difficulties leading to this variation, that the problem of the legal control of sex expression illustrates, more clearly even than the control of the sale of alcoholic beverages, the relation and non-relation of law and social restraint.

130 3 Bates-Harbin, Quarter Sessions Records for the County of Somerset, Commonwealth (Somerset Rec. Soc. 1912) XLIV, XLVI.
131 Spectator, No. 629.
134 Woolston, Prostitution in the United States (1921) 229 et seq.